No. 86-814 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners

v.

ARIZONA STATE TRANSPORTATION
DEPARTMENT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE AK-CHIN INDIAN COMMUNITY; BAY MILLS INDIAN COMMUNITY; BENTON UTU UTU GWAITU PAIUTE TRIBE; BIG LAGOON RANCHERIA; BISHOP PAIUTE SHOSHONE TRIBE; CABAZON BAND OF MISSION INDIANS

(additional amici on inside cover)
IN SUPPORT OF PETITIONER

Yvonne Teresa Knight
Counsel of Record
Melody L. McCoy
Kim Jerome Gottschalk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amici Curiae

December, 1986

AMICI

Cahuilla Band of Indians;
Campo Band of Mission Indians;
Chemehuevi Indian Tribe;
Cherae Heights Indian Community of the Trinidad Rancheria;
Confederated Tribes of the Colville Reservation;
Death Valley Timbisha Tribe;
Eastern Band of Cherokee Indians;
Fort Independence Paiute Shoshone Tribe;
Gila River Indian Community;
Hoopa Valley Tribe;
Keweenaw Bay Indian Community;
La Jolla Band of Mission Indians;
Lummi Indian Tribe;
Manzanita Band of Mission Indians;
Menominee Indian Tribe of Wisconsin;
Mescalero Apache Tribe;
Northern Arapahoe Tribe;
Oglala Sioux Tribe;
Pala Band of Mission Indians;
Pit River Tribe;
Pueblo of Acoma;
Pyramid Lake Paiute Tribe of Indians;
Rincon Band of Mission Indians;
Rohnerville Rancheria;
Sac and Fox Tribe of the Mississippi in Iowa;
San Pasqual Band of Mission Indians;
Santa Rosa Rancheria;
Southern Ute Indian Tribe;
Tohono O'Odham Nation;
Tule River Tribe;
Walker River Paiute Tribe;
American Indian Bar Association;
National Congress of American Indians

No. 86-814

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners

v.

ARIZONA STATE TRANSPORTATION
DEPARTMENT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE AK-CHIN INDIAN COMMUNITY; BAY MILLS INDIAN COMMUNITY; BENTON UTU UTU GWAITU PAIUTE TRIBE; BIG LAGOON RANCHERIA; BISHOP PAIUTE SHOSHONE TRIBE; CABAZON BAND OF MISSION INDIANS
(additional amici on inside cover)
IN SUPPORT OF PETITIONER

Yvonne Teresa Knight
Counsel of Record
Melody L. McCoy
Kim Jerome Gottschalk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amici Curiae

December, 1986

AMICI

Cahuilla Band of Indians;
Campo Band of Mission Indians;
Chemehuevi Indian Tribe;
Cherae Heights Indian Community of the Trinidad Rancheria;
Confederated Tribes of the Colville Reservation;
Death Valley Timbisha Tribe;
Eastern Band of Cherokee Indians;
Fort Independence Paiute Shoshone Tribe;
Gila River Indian Community;
Hoopa Valley Tribe;
Keweenaw Bay Indian Community;
La Jolla Band of Mission Indians;
Lummi Indian Tribe;
Manzanita Band of Mission Indians;
Menominee Indian Tribe of Wisconsin;
Mescalero Apache Tribe;
Northern Arapahoe Tribe;
Oglala Sioux Tribe;
Pala Band of Mission Indians;
Pit River Tribe;
Pueblo of Acoma;
Pyramid Lake Paiute Tribe of Indians;
Rincon Band of Mission Indians;
Rohnerville Rancheria;
Sac and Fox Tribe of the Mississippi in Iowa;
San Pasqual Band of Mission Indians;
Santa Rosa Rancheria;
Southern Ute Indian Tribe;
Tohono O'Odham Nation;
Tule River Tribe;
Walker River Paiute Tribe;
American Indian Bar Association;
National Congress of American Indians

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE(S)

STATUTES

No. 86-814

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners

v.

ARIZONA STATE TRANSPORTATION
DEPARTMENT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE
OF THE AK-CHIN INDIAN COMMUNITY, ET AL.

Pursuant to Rule 36.1, amici curiae consisting of thirty-seven federally recognized Indian tribes, and two national Indian organizations,

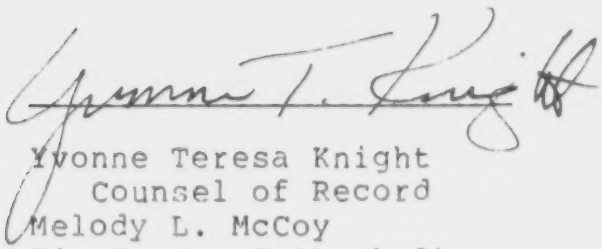
respectfully move this Court for leave to file the attached brief amici curiae in support of the White Mountain Apache Tribe's petition for writ of certiorari in the above-captioned case. Respondent Arizona State Transportation Department objects to the filing of the brief of amici, and therefore, this motion is necessary.

Amici have a substantial interest in the resolution of the issues raised by petitioner in this case. The decision of the Ninth Circuit Court of Appeals seriously handicaps the ability of Indian tribes to vindicate their rights to be free from state interference with the trust relationship between Indian tribes and the federal government.

Amici submit the attached brief to assist in showing the Court that the issues presented by the petition for writ

of certiorari are of substantial importance because they involve the construction of the scope of 42 U.S.C. § 1983 and the interrelationship between that statute and the rights of American Indian tribes under federal statutory trust schemes.

Respectfully submitted,



Yvonne Teresa Knight
Counsel of Record
Melody L. McCoy
Kim Jerome Gottschalk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amici Curiae

No. 86-814

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners

v.

ARIZONA STATE TRANSPORTATION
DEPARTMENT, et al.,
Respondents.

BRIEF AMICI CURIAE
OF THE AK-CHIN INDIAN COMMUNITY, ET AL.

INTEREST OF THE AMICI CURIAE

Amici curiae are thirty-seven federally recognized Indian tribes, and two national Indian organizations committed to the protection of tribal rights. The National Congress of American Indians, founded in 1944, is the oldest and largest national organization

of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined population of over 750,000 American Indians and Alaska Native people. The American Indian Bar Association was founded in 1976 to facilitate more effective legal representation for all Indian people, and has a national membership of Indian attorneys and other professionals and paraprofessionals involved in the provision of legal services to American Indians.

Procuring relief for deprivations of tribal rights is greatly facilitated by the ability to obtain attorney's fees. Some amici tribes are now seeking attorney's fees in federal and state courts. All amici are concerned that the unavailability of attorneys fees

under 42 U.S.C. § 1983 will severly limit the ability of American Indian tribes to enforce their rights under federal statutory trust schemes designed to promote tribal self-government and economic self-sufficiency. In most instances, the federal trustee, either through choice or neglect, fails to defend the integrity of the trust established by such legislation. For example, the United States was not a party plaintiff in any of the cases brought by tribes in this Court to enforce preemptive federal trust legislation.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the question of whether federal and state appellate courts have misinterpreted Pennhurst State School and Hospital v. Halderman,

451 U.S. 1 (1981) as limiting Maine v. Thiboutot, 448 U.S. 1 (1980). The misinterpretation has taken two directions: (1) twisting Pennhurst to justify excluding from 42 U.S.C. § 1983 rights already enforced pursuant to other laws; and (2) excepting subsets of laws from the coverage of § 1983. Both results are contrary to Thiboutot. Neither result is justified by Pennhurst.

Assuming arguendo that the lower courts are correct in adopting limitations on the scope of § 1983, this Court should clarify what those limitations are. Presently there exists much confusion in and among the decisions of the appellate courts. The Ninth Circuit decision in this case is a prime example of the confusion that can result from the lack of guidance from this Court.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE IMPORTANT FEDERAL QUESTION OF WHETHER THE LOWER COURTS ARE CORRECT IN CONSTRUING PENNHURST STATE SCHOOL AND HOSPITAL V. HALDERMAN, 451 U.S. 1 (1981) AS LIMITING THIS COURT'S HOLDING IN MAINE V. THIBOUTOT, 448 U.S. 1 (1980)

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court held that 42 U.S.C. §1983, which provides a civil remedy for deprivation under the color of state law of any "rights, privileges, or immunities secured by the Constitution and laws" protects all federal rights (emphasis added). The phrase "and laws" was not to be limited to a particular subset of laws.

Subsequently, the Court decided Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (some statutory schemes themselves reflect an intent to foreclose a §1983

action).[1/]

The Ninth Circuit and other appellate courts, both state and federal, have substantially curtailed the effect of Thiboutot, ostensibly in reliance on Pennhurst. Limitation has come by excepting out subsets of laws, as the Ninth Circuit has done here, discussed infra, and by excepting out from § 1983 subsets of enforceable rights.

Probably the clearest example of the latter limitation is the just-decided Arizona Supreme Court case of Central Machinery Co. v. State of Arizona, No. 18493-PR (Ariz. Dec. 12, 1986) (Attached as an appendix to Respondents' Brief In

---

[1/]Sea Clammers obviously did limit Thiboutot, but not in a manner relevant here.

Opposition).[2/] In rejecting the application for attorneys fees in Central Machinery, the Arizona Supreme Court acknowledged that "[w]e do not doubt that Justice Brennan's majority opinion in Maine, standing alone, would justify a finding that Central Machinery's original action was cognizable under §1983." (See appendix to Respondents' Brief). The court, however, felt that Pennhurst had significantly limited Maine v. Thiboutot.

Pennhurst holds that merely precatory statutory language does not create rights and therefore the question of enforceability under § 1983 or any other

---

2/The case underlying the claim for attorneys fees in Central Machinery Co. v. State of Arizona, was decided by this Court on the same day as the case providing the basis for the claim for fees here. See Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

statute need not be reached. Appellate courts, however, have failed to include within § 1983 rights already established, thus denying recovery of attorney's fees under 42 U.S.C. § 1988. Pennhurst does not hold that enforceable rights, such as are involved here, can ever be excluded from § 1983 protection, and the appellate courts are in error in relying on Pennhurst for this exclusion.

The Arizona Supreme Court's opinion also summarizes the confusion which exists in federal circuit courts after Pennhurst. (See appendix to Respondents' Brief). The Ninth Circuit itself acknowledges a conflict between its decision in this case and decisions in two other circuits. See Yapalater v. Bates 644 F.2d 131 (2d Cir. 1981), cert. denied, 455 U.S. 908 (1982); Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir.

1980). Contrary to the Ninth Circuit's decision here, the New Mexico Court of Appeals in Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M. Ct. App. 1986), cert. denied, 55 U.S.L.W. 3310 (U.S. Nov. 4, 1986) (No. 86-367) (App. I to Petitioners' Brief at A-143 to A-165) awarded attorney's fees based upon its conclusion that the preemption of state taxes by federal statutes is a claim actionable under §1983.

It is apparent that only a definitive answer by this Court can bring order out of the chaos presently existing over this important issue. This case presents the opportunity to do so.

II. ASSUMING ARGUENDO THAT § 1983 DOES NOT PROVIDE A REMEDY FOR VIOLATION OF ALL FEDERAL RIGHTS, THE NINTH CIRCUIT'S DECISION THAT AN INDIAN TRIBE PREVAILING ON A PREEMPTION CLAIM IS NOT ENTITLED TO § 1983 REMEDIES RAISES IMPORTANT QUESTIONS REGARDING THE PROPER STANDARDS TO BE APPLIED TO DETERMINE THE SCOPE OF § 1983.

Assuming arguendo that the Ninth Circuit and other appellate courts are correct in adopting standards which restrict the applicability of § 1983, this Court should accept review of this case to define the proper standards to be applied to determine what laws and rights are within the scope of § 1983.

A. There Presently Exists Confusion Among State And Federal Appellate Courts As To The Proper Standards By Which to Determine Whether A Right Is Enforceable Under § 1983.

As recognized by the Arizona Supreme Court in Central Machinery Co. v. State of Arizona, (attached as an appendix to

respondents' brief) the lower courts confronting the issue of rights enforceable under § 1983 "have not clearly drawn the line that separates mere benefit from 'enforceable rights.'" That Court further noted that there are "discrepancies between various circuits . . . about the enforceability of 'rights'" within § 1983. The question of what rights are enforceable under § 1983 is too important to allow "discrepancies" to exist in the lower courts.

B. The Limitations On § 1983, Adopted By The Ninth Circuit In This Case, Have No Basis In Pennhurst; And Reflect A Misapprehension Of The Unique Nature Of Tribal Rights Under Federal Trust Legislation.

In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Tribe prevailed on its claim that the federal Indian timber statutes, 25 U.S.C. §§ 406-07, preempted the imposition of

Arizona's motor carrier license and fuel use taxes. On remand, the District Court awarded the Tribe attorney's fees under § 1988 because it concluded that the Tribe's claim was actionable under § 1983. White Mountain Apache Tribe v. Williams, No. Civ. 73-788 PCT WEC (D. Ariz. Mar. 11, 1981) (Craig, District Judge). Reversing the award, a majority of a 3-judge panel of the Ninth Circuit concluded that the Tribe's preemption claim was not actionable under § 1983. White Mountain Apache Tribe. v. Williams, 798 F.2d 1205 (9th Cir. 1986) ([Second] Amended Opinion).

1. The Ninth Circuit's Limitation On The Reach of § 1983 Is Based Upon A Misapprehension Of The Supremacy Clause And Its Interrelationship With The Indian Commerce Clause.

The primary error of the Ninth Circuit was in characterizing the

question before it as "whether the Supremacy Clause creates 'rights, privileges or immunities' within the ambit of § 1983." (Appendix To Petitioners' Brief at A-5.) The Supremacy Clause does not create rights. Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). The Indian Commerce Clause is the source of the rights at issue here. McClanahan v. Arizona State Tax Comm'n, 441 U.S. 164, 172 and n.7 (1973); Ramah Navajo, 720 P.2d at 1254 (A-160). The Ninth Circuit then compounds its error by classifying the Supremacy Clause as a power allocating provision of the Constitution and concluding from Chapman: "power conferring provisions of the Constitution do not create 'rights, privileges, or immunities' within the meaning of

§ 1983." (A-9). Chapman made no such holding.

Chapman acknowledges that the Supremacy Clause secures rights no matter what their source. 441 U.S. at 613. In other words, the Supremacy Clause is a common factor in the priority of all rights under federal law whether they derive from those parts of the Constitution which spell out individual rights or those which enumerate the power of the federal government. The Supremacy Clause does not belong to either side of this equation. Nevertheless the Ninth Circuit classifies it with those provisions of the constitution which apportion power and holds that those rights are not protected by § 1983. The Court insists this is so even if a regulatory scheme was designed to benefit the Indians (A-12).

> Rather the focus must be on the basis of the Supreme Court's decision in Bracker--preemption pursuant to the Supremacy Clause. So directed, our inquiry leads to the conclusion that the Bracker decision is grounded not on individual rights but instead on considerations of power--the division of authority between the state and the national government (A-12).

Thus the Ninth Circuit holding is based both on a misapprehension of the nature of the Supremacy Clause and the mistaken view that legislation enacted pursuant to constitutional provisions other than those dealing with individual rights cannot give rise to rights protected by § 1983.[3/]

3/Admittedly the court stated that it was restricting its holding to cases where it saw no direct violation, but explicitness should have no bearing on whether the source of the right is one capable of establishing individual rights or not. See, fn. 7 at A-10.

The point of Thiboutot is that rights do not have to derive from those sections of the Constitution dealing with civil rights in order to be protected by § 1983. See also, Ramah Navajo, 720 P.2d at 1254 (A-160 to A-161) (acting pursuant to the Indian Commerce Clause, Congress granted the right to coordinate education of Indian children and an immunity from taxation).

The Ninth Circuit opinion thus excepts out vast subsets of federal law from the protection of § 1983. Nothing in Pennhurst remotely suggests such a limitation of Thiboutot.

2. The Ninth Circuit Erred In Holding That Implied Tribal Rights Based On The Indian Preemption Doctrine Are Not Enforceable Under § 1983.

The Ninth Circuit's decision in this case excepts a broad range of tribal rights from § 1983 protection, and from

the right to attorney's fees. In effect, the Ninth Circuit applies the narrower non-Indian preemption doctrine to determine what Indian rights are enforceable under § 1983.

In contrast to non-Indian cases, implied preemption in Indian law is the rule, rather than the exception. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Williams v. Lee, 358 U.S. 217 (1959); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). As a general rule, absent express congressional authority, state laws are inapplicable in Indian country. See, e.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. ____, 105 S.Ct. 2399 (1985). This contrasts sharply with the general rule in non-Indian preemption cases, in which state laws apply except to the extent they specifically conflict

with federal laws. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976). As this Court stated in Bracker, "it [is] generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law." 448 U.S. at 143.

This broad standard of preemption, applicable only to Indian cases, has generated a broad scope of strong tribal rights. In this case, it is indisputable that the Tribe has the right to enjoin state interference with the federal-tribal relationship established by the timber statutes. See, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). The general right of tribes to enforce their right to non-interference by the states has been affirmed consistently by this Court when

construing federal legislation. See, Montana v. Blackfeet Tribe of Indians, 105 S.Ct. 2399 (1985); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); Central Machinery Co. v. Arizona State Tax Comn'n, 448 U.S. 160 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

Thus, the direct violation test applied by the Ninth Circuit in this case has no application in Indian law where, unlike non-Indian cases, preemption can be implicit. This Court has expressly held that the test for preemption in Indian law is much broader than a "direct violation" and so, accordingly, should be the test for whether a tribe's claim

supports an action under § 1983.

Even if the direct violation test should be applied here, it is met on the facts of this case. The Ninth Circuit majority incorrectly concluded that no violation of tribal rights occurred in this case. This Court held in Bracker that the Tribe has the right to be free from state interference with the implementation of the timber statutes. A fortiori the state is obligated to refrain from interference. Unlike the federal funding scheme reviewed in Pennhurst, state compliance with this obligation is mandatory. Failure to comply by wrongfully interfering may be enjoined. See, Bracker, 448 U.S. 136.

These rights, obligations and remedies are at the heart of the decision in Bracker. The state, by taxing the

timber harvest activities, breached its obligation of non-interference. This Court held that the Tribe is entitled to relief from this unjustified interference. 448 U.S. at 148 and 151. This holding was based on the ground that "at the most general level," the state tax "threatens federal objectives," and "undermines federal policy." This Court than stated that "the imposition of the state taxes would adversely affect the Tribe's ability" to achieve the purposes of the statute. 448 U.S. at 149-50 (emphasis added). Further, the regulations state as one of their objectives "'development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the

benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.' 25 C.F.R. § 141.3(a)(3) (1979)." 448 U.S. at 147 (emphasis added). The timber statutes and regulations gave rights to the tribe and these rights were directly violated by the state's attempt to impose its taxes.

CONCLUSION

Congress has long secured tribal rights from deprivation by the states. The decision of the Ninth Circuit is contrary to this congressional tradition, and prejudices those Indian tribes whose access to legal assistance is essential but severely restricted by their poverty. Moreover, in this case this Court has expressly upheld the Tribe's right to state non-interference with the implementation of the timber statutes--a

right which is the corollary of the Tribe's right to political and economic self-sufficiency. To properly fulfill the intent of Congress in securing tribal rights, the protections of the Civil Rights Act remedies should be available to assist in vindicating these rights.

December 17, 1986

Respectfully submitted,

Yvonne Teresa Knight
Counsel of Record
Melody L. McCoy
Kim Jerome Gottschalk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Amici Curiae